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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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COMMISSIONERS

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AZ CORP COMMISSION
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MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

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Mike

In the matter of:

DOCKET NO. S-03464A-03-0000

MUTUAL BENEFITS CORPORATION,

Respondent.

PLAINTIFF SECURITIES DIVISION'S OPPOSITION
TO MUTUAL BENEFITS CORPORATION'S
MOTION TO QUASH SUBPOENA

Plaintiff, the Securities Division (Division) of the Arizona Corporation Commission ("Commission"), responds to Mutual Benefits Corporation's ("MBC") Motion to Quash Subpoena ("Motion") and requests that MBC's Motion be denied. The Division supports this motion with the attached memorandum of points and authorities.

DATED this 17th day of June, 2003.

MARK SENDROW, Director of Securities

By: 

Phillip A. Hofling
Attorney for the Securities Division of
the Arizona Corporation Commission

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2
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4 MARC SPITZER, Chairman
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7 In the matter of:)

DOCKET NO. S-03464A-03-0000

8 MUTUAL BENEFITS CORPORATION,)

9 Respondent.)

10
11 **SECURITIES DIVISION**

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 On May 6, 2003, the Commission issued an investigative subpoena to Debbie Brugliera
14 seeking information and documents in the possession of Ms. Brugliera that relate to her offers and
15 sales of viatical settlement investment contracts in Arizona. MBC argues that, because the
16 Commission has initiated a formal administrative proceeding against MBC, taking the testimony
17 of Ms. Brugliera is subject to the Arizona Rules of Civil Procedure ("ARCP") regarding
18 depositions. Thus, MBC asks that the investigative subpoena be quashed.

19 MBC has filed three motions before this tribunal attempting to invoke the ARCP even
20 though it knows that the ARCP does not apply to any of the issues it has raised. Furthermore, two
21 of its motions contain factually inaccurate statements that serve to confuse matters.¹ Only one

22 ¹ Inaccurate statements made by MBC in its Motion to Dismiss, Motion for More Definite Statement were addressed in
23 the Division's response to that Motion. In its Motion to Quash Subpoena, MBC incorrectly claims the Division
24 acknowledged that Ms. Brugliera's testimony was being compelled as part of the administrative proceeding. The
25 subpoena was not issued pursuant to R14-3-210 and the Division never acknowledged that the subpoena was part of
26 the administrative proceeding. To the contrary, the subpoena was issued in connection with ongoing investigations into
viatical sales in general. The subpoena's reference to the case name and number is for convention and file convenience
only. Otherwise it has no independent meaning. Separate administrative proceedings will be brought against those
agents as warranted. Furthermore, MBC is once again being disingenuous stating the Division issued the subpoena to
uncover evidence it did not have when it improperly filed charges against MBC. MBC's Motion at P.4-5. MBC knows
the Division previously subpoenaed and interviewed several individuals who sold MBC viaticals. To maintain the
Division has no evidence to support the conduct it detailed in its complaint against MBC is unsupportable.

1 conclusion can be reached about MBC's factually inaccurate statements and its repeated attempts
2 to apply the ARCP; MBC is causing unnecessary delay or needless increase in the cost of
3 litigation.

4 MBC's motion should be denied because (1) the ARCP does not apply to the subpoena, (2)
5 the law does not limit the Commission's constitutional and statutory investigative powers because
6 a formal proceeding has been initiated, (3) MBC is not entitled to access to the Division's
7 investigation, (4) MBC has no standing to bring a motion to quash the investigative subpoena
8 issued to Debbie Brugliera, (5) there is no justiciable controversy; and (6) even if MBC had
9 standing, it has not met its burden.

10 **I.**
11 **THE ARCP DOES NOT**
12 **GOVERN THE TAKING OF MS. BRUGLIERA'S TESTIMONY**

13 Investigations, examinations, and administrative proceedings under the Securities Act are
14 governed by Title 14, Chapter 4, Article 3, of the Arizona Administrative Code ("Article 3").
15 R14-4-301. When not in conflict with Article 3, the Corporation Commission Rules of Practice
16 and Procedure ("Commission Rules") apply to administrative proceedings. R14-4-301. Only
17 when a procedure is not set forth by law, by Article 3, by the Commission Rules, or by orders of
18 the Commission does the ARCP govern. R14-3-101.

19 MBC's position essentially requires that the Division be placed in the shoes of a private
20 litigant once the Division has initiated an action. The ARCP "Depositions and Discovery" section
21 provides private parties a means to discover the opposing party's facts. Discovery, however, in
22 actions brought by regulatory agencies is set forth by law—the discovery rules of the Rules of
23 Civil Procedure generally do not apply. Furthermore, "there is no basic constitutional right to
24 pretrial discovery in administrative proceedings." *Silverman v. Commodity Futures Trading*
25 *Com'n*, 549 F.2d 28 (7th Cir. 1977), *See also N.L.R.B v. Interboro Contractors, Inc.*, 432 F.2d 854,
26 857 (2d Cir. 1970), cert. denied, 402 U.S. 915, 91 S.Ct. 1375 (1971); *Starr v. Commissioner of*
Internal Revenue, 226 F.2d 721, 722 (7th Cir. 1955), cert. denied, 350 U.S. 993, 76 S.Ct. 542

1 (1956). Prehearing discovery in agency proceedings is a matter of agency discretion. Aman and
2 Mayton, *Administrative Law*, p.223 (1998). See also *Mister Discount Stockbroker, Inc., v. S.E.C.*,
3 768 F.2d 875, 878 (7th Cir. 1985). A practical means of discovery frequently provided for by
4 regulatory agencies is the prehearing conference. The Commission Rules thus address discovery:
5 R14-3-108 provides for a prehearing conference for the purposes of, among other things,
6 formulating or simplifying the issues, obtaining admissions of facts, arranging for the exchange of
7 proposed exhibits or prepared expert testimony, and other matters that may expedite the conduct of
8 the proceeding. Additionally, as MBC points out, R14-3-109(P) allows depositions conducted “in
9 the manner prescribed by law and of the civil procedure for the superior court.” Contrary to
10 MBC’s assertions, however, R14-3-109 does not mandate depositions and it certainly does not
11 preclude the exercise of the investigative powers of the Commission.

12 Even if the discovery rules applied to administrative actions, the argument that the
13 Commission is restricted to the discovery rules of the ARCP is untenable. The Commission is not
14 a private party; the Commission is a regulatory body, responsible for enforcing the Securities Act
15 for the benefit of Arizona citizens. It cannot be placed in a position of negotiating² for agreement
16 of all parties regarding individuals from whom the Commission determines the taking of testimony
17 is necessary and proper. It cannot be placed in a position of foregoing the benefits to Arizona
18 citizens of initiating a formal administrative proceeding in order to continue its investigation of a
19 respondent’s activities; or limiting its investigation in order to proceed with an action.³

22 ² Private parties have incentive to accommodate one another regarding depositions—to agree to the deposition desired
23 by the opposing party in order to get agreement for a deposition desired by the party. A respondent has no incentive to
allow the Commission to continue its investigation in the form of depositions.

24 ³ For example, the Commission may issue temporary cease and desist orders and a notice of opportunity for hearing
25 when the public welfare requires immediate attention. A.R.S. § 44-1972(C). If taking immediate action to protect the
26 public welfare terminates the Commission’s power to continue to investigate, the Commission is placed in the position
of either postponing the issuance of a temporary cease and desist order so that it may conduct a full and complete
investigation or issuing a temporary cease and desist order and foregoing its investigative powers. This would defeat
the remedial mandate of the Commission, either by forestalling the Commission from preventing the public from
suffering harm at the hands of miscreants through quick action to stop illegal conduct or by limiting the Commission’s
ability to further conduct private investigations.

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II.
THE COMMISSION HAS BROAD
INVESTIGATIVE POWERS THAT AUTHORIZE
THE INVESTIGATIVE SUBPOENA ISSUED TO
DEBBIE BRUGLIERA

Essentially, MBC seeks to gain access to or limit Division investigations by arguing that once the Division has initiated a formal administrative proceeding, it can no longer conduct investigations, but is restricted to prehearing discovery rules. But MBC has no authority for such a restriction. None of the statutes or rules cited by MBC so restrict the Commission's investigative authority.

Article 15, section 4, authorizes the Commission to investigate and to take testimony. The Commission's powers are not limited to those expressly granted by the constitution. *Garvey v. Trew*, 46 Ariz. 342, 170 P.2d 845 (1946) *cert. denied* 329 U.S. 784. The Arizona legislature has given the Commission broad investigative powers to "investigate and examine into the affairs of any person issuing or dealing in or selling or buying or intending to issue, deal in or sell or buy securities." A.R.S. § 44-1822. The Commission may issue subpoenas that, "in the opinion of the commission, are necessary and proper for the enforcement" of the Securities Act. A.R.S. § 44-1823(A). Courts "give the Commission 'wide berth' when they review the validity of Commission investigations." *Carrington v. Arizona Corp. Com'n*, 199 Ariz. 303, 18 P.3d 97 (Ct. App. 2001). Neither the Commission Rules nor the ARCP apply to any investigation by the Commission. R14-3-101(A).

As a combination of investigative and adjudicative functions, without more, does not constitute a due process violation, certainly the combination of enforcement and investigative functions is not constitutionally prohibited. *See Withrow v. Larkin*, 95 S. Ct. 1456 (1975). The due process clause is not implicated because an administrative investigation adjudicates no legal rights. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984). No Arizona law precludes the continuation of investigative powers after the initiation of a formal administrative proceeding.

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III.
THE INITIATION OF A FORMAL ADMINISTRATIVE PROCEEDING
DOES NOT ENTITLE MBC TO
ACCESS THE DIVISION'S INVESTIGATION

The constitutional sufficiency of administrative procedures is tested by an analysis of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The law is well settled that when a governmental agency adjudicates—makes a binding determination—the agency is under more stringent due process requirements. *See e.g. Hannah v. Larche*, 363 U.S. 420 (1960). The Division is not, however, making a binding determination by initiating a formal administrative proceeding. The adjudication occurs at the hearing and the open meeting at which the Commissioners address the administrative law judge's recommended order. Thus, due process considerations do not preclude the conduct of a private investigation subsequent to the initiation of an administrative proceeding.

The prejudice MBC apparently anticipates suffering from an investigation conducted subsequent to the initiation of an administrative proceeding is unspecified and speculative. Any anticipated prejudice is too remote to justify so extreme an action as denying the Commission its authority to conduct investigations. MBC will receive the appropriate due process protections during the adjudication of the charges brought against it. *See Stoffel v. Arizona Dept. of Economic Sec.*, 162 Ariz. 449, 784 P.2d 275 (Ct. App. 1989) (agency acts in quasi-judicial manner when it is under statutory duty to consider evidence and apply law to facts it finds). *See also* A.A.C. R14-3-109 and A.A.C. R14-3-113. Anticipation of wrongful use of information or evidence received as a result of an investigative formal interview is inappropriate.

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IV.
**MBC HAS NO STANDING TO MOVE TO QUASH
AN INVESTIGATIVE SUBPOENA ISSUED TO
DEBBIE BRUGLIERA**

MBC has no standing to bring a motion to quash the subpoena to Ms. Brugliera. The Division has not brought an action to enforce the subpoena, as it may do under A.R.S. § 44-1825(A) in the Maricopa County Superior Court. MBC's remedy would be to seek to defend against a subpoena enforcement proceeding, at which time MBC would be required to meet the standards set forth in Rule 24 of the Civil Rules of Procedure.⁴ *See e.g. SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 104 S. Ct. 2720 (1984) (the target of an investigation may seek intervention in a subpoena enforcement action brought against the subpoena recipient or restrain compliance by the recipient, thereby forcing the agency to institute an enforcement suit).

In any event, a party may not challenge a subpoena directed to a third party unless the objecting party can make a claim to some personal right to privilege in respect to the subject matter of the subpoena, *Lipschultz v. Superior Court*, 128 Ariz. 16, 623 P.2d 805 (1981), or has some other interest that could be vindicated by a challenge to the subpoena. *U.S. v. Miller*, 96 S. Ct. 1619 (1976). As a general rule, issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant. *U.S. v. Miller*, 96 S. Ct. 1619 (1976). As illustrated above, the investigative subpoena to Ms. Brugliera does not violate the rights of MBC.

The Commission has no duty to notify a target of an investigative subpoena issued to a third party for information and documents belonging to that third party. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 104 S. Ct. 2720 (1984). The constitution is not offended when an agency uses its subpoena power to gather evidence from a third party that may be adverse to the person under

⁴ Intervention in an action shall be permitted "(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Rule 24(a). Intervention may be permitted "1. When a statute confers a conditional right to intervene. 2. When an applicant's claim or defense and the main action have a question of law or fact in common." Rule 24(b).

1 investigation. *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 104 S. Ct. 2720 (1984). "[T]he general
2 rule is that the issuance of a subpoena to a third party to obtain the records of that party does not
3 violate the rights of a defendant, even if a criminal prosecution is contemplated at the time the
4 subpoena is issued." *U.S. v. Miller*, 96 S. Ct. 1619 (1976).

5
6 **V.
NO JUSTICIABLE CONTROVERSY**

7 MBC moves to quash the subpoena to Ms. Brugliera because MBC "believes that the
8 Division will attempt to reinstate this subpoena if it is not quashed."

9 The subject subpoena was issued on May 6 for compliance on May 20, 2003. Ms.
10 Brugliera did not comply. Even if Ms. Brugliera had complied, any injury to MBC is purely
11 speculative and anticipatory on the part of MBC. MBC has not presented a justiciable argument.
12 *See e.g. Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997)

13 An issue is not ripe for review "here the existence of the dispute itself hangs on
14 future contingencies that may or may not occur." (citation omitted) Where there is
15 no danger of imminent and certain injury to a party, an issue has not "matured
16 sufficiently to warrant judicial intervention." (citation omitted) The Supreme Court
17 has stated a two-part test for determining the ripeness of a claim: "the fitness of the
18 issues for judicial decision and the hardship to the parties of withholding court
19 consideration." *Abbot*, 387 U.S. at 149.

20
21 **VI.
EVEN IF MBC HAD STANDING,
22 IT HAS NOT MET ITS BURDEN**

23 A party may resist a Commission subpoena on the grounds that the inquiry is not within the
24 Commission's scope of authority, the order is too vague, the subpoena seeks irrelevant
25 information, or the investigation is being used for an improper purpose. *Carrington v. Arizona
26 Corp. Com'n*, 199 Ariz. 303, 305, 18 P.3d 97, 99 (Ct. App. 2001). MBC's motion to quash the
subpoena essentially argues that the subpoena is improper because the only method by which the
Commission may obtain testimony from Ms. Brugliera is pursuant to the rule of civil procedure
governing depositions. MBC's position is that the initiation of a proceeding terminates the

Commission's ability to conduct further investigation. MBC's premise is incorrect and MBC has not met its burden to succeed on its motion.

**VIII.
CONCLUSION**

In sum, MBC has no constitutional right to pre-hearing discovery. MBC has no right to intervene or be present in any investigative interview of individuals who may have sold MBC viaticals regardless of the fact that an Administrative proceeding has been commenced against MBC. The fact that an administrative proceeding has commenced does not alter the Division's ability to continue to conduct an administrative investigation to the exclusion of Respondent. Furthermore, the ARCP does not apply to the taking of investigative interviews. For the foregoing reasons, the Division respectfully requests that MBC's Motion to Quash be denied.

Dated the 17th day of June, 2003

MARK SENDROW, Director of Securities

By: 

Phillip A. Hofling
Attorney for the Securities Division of
the Arizona Corporation Commission

ORIGINAL AND THIRTEEN (13) COPIES
of the foregoing filed this 17th day of June, 2003 with:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered this 17th day
of June, 2003, to:

Mr. Marc Stern
Administrative Law Judge
Arizona Corporation Commission
Hearing Division

1 1200 West Washington
2 Phoenix, Arizona 85007

3 By: 

4 Copy of the foregoing hand-delivered this 17th day
5 of June, 2003, to:

6 Paul J. Roshka, Jr. Esq.
7 Alan S. Baskin, Esq.
8 James M. McQuire, Esq.
9 One Arizona Center
10 400 East Van Buren Street, Suite 800
11 Phoenix, Arizona 85004

12 By: 